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February 24, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, CC Docket No. 97-11

Dear Mr. Caton:

Enclosed herewith for filing are the original and 11 copies of MCI Telecommunications Corporation's Petition For Reconsideration in the above-captioned docket.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Petition furnished for such purpose and remit same to the bearer.

Sincerely yours,

Lawrence Fenster

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(2)(A) of	)	CC Docket No. 97-11
the Telecommunications Act of 1996	)	
	)	

COMMENTS OF MCI COMMUNICATIONS CORPORATION

Lawrence Fenster
MCI Telecommunications Corp.
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February 24, 1997

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Summary

Congressional intent with regard to Section 214 procedures was never limited to the avoidance of investment in wasteful, duplicative, facilities. Congressional intent also included a concern for investment in inefficient facilities. Also, the Commission historically interpreted Congressional intent with regard to its Section 214 procedures as including a concern that investments might be used in a discriminatory fashion. Moreover, Congress viewed Section 214 processes as a complement to the Commission's cost allocation, separations, and separate subsidiary requirements, rather than being superseded by these other regulatory tools.

The recent history of incumbent LEC investment reveals that inefficient investments; as opposed to duplicative, goldplated, investment; may be made to foreclose competitive entry. Whereas a firm regulated under rate of return regulation has an incentive to engage in wasteful, duplicative, investment in order to inflate its rate base and increase rate levels; a firm attempting to forestall competitive entry into its core markets has an interest in making inefficient investments in excess capacity in order to support targeted, anticompetitive price reductions.

The Commission fails to show that price cap LECs and average schedule carriers will not be able to undertake anticompetitive investments in facilities that are inefficient and discriminatory. Consequently, Section 214 review remains a needed protection for price cap LECs and average schedule carriers. The Commission's goal of promoting competition is best achieved by retaining its Section 214 review for price cap and average schedule LECs while granting them increased filing flexibility.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996	)	**CC Docket No. 97-11**
	)	
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COMMENTS

MCI Telecommunications Corporation ("MCI") respectfully submits its comments in response to the Notice of Proposed Rulemaking ("Notice") in the above-captioned docket[1]. In this Notice, the Commission is seeking comments from interested parties on how to implement Section 402(b)(2)(A) of the Telecommunications Act of 1996, and whether to forbear from further enforcement of its remaining Section 214 authority in light of Section 401 of the 1996 Act.[2]

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[1] In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, CC Docket 96-237, FCC No. 96-456, released November 22, 1996.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. In these comments, MCI refers to the new statute as either "the 1996 Act" or "the Act."

I. The Commission Ignores the Continuity of Congressional Intent Concerning Section 214

A. The Commission Has Historically Interpreted Congressional Intent Regarding Section 214 Much Broader than Preventing Duplication of Useless Facilities

In its Notice, the Commission attempts to draw a clear line between the legislative intent of the Communications Act of 1934, and the 1996 Act, noting that "Section 214 was originally enacted to prevent a monopoly carrier from engaging in 'useless duplication of facilities, with consequently higher charges upon the users of the service,' [while t]he stated legislative purpose of the 1996 Act is 'to promote competition and reduce regulation in order to secure lower prices and higher quality services...and encourage the rapid deployment of new telecommunications technologies.'"[3]

1. Inefficient investment differs from duplicative investment

The quotes above exclude important aspects of Congressional intent that do not support a difference with regard to Section 214 in 1934 and 1996. The Commission has recognized that the 1934 Congress intended Section 214 to not only prevent useless duplication of facilities, but also prevent *inefficient* investment in facilities.

> "The legislative history indicates two purposes for these provisions. First, there was the fear that duplicate, unnecessary, *or inefficient* facilities would inflate a carrier's rate base and lead to higher charges to users of services."[4] (emphasis added)

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[3] Id. at para 9.

[4] In the Matter of Long-Run Regulation of AT&T's Basic Domestic Interstate Services (Long-Run Regulation Order), CC Docket No. 83-1147, 5 FCC Rcd 5411 (1990) at para. 19.

The recent history of incumbent LEC investment reveals that inefficient investments; as opposed to duplicative, goldplated, investment; may be made to foreclose competitive entry. Whereas a firm regulated under rate of return regulation has an incentive to engage in wasteful, duplicative, investment in order to inflate its rate base and increase rate levels; a firm attempting to forestall competitive entry into its core markets has an interest in making inefficient investments in excess capacity in order to support targeted, anticompetitive price reductions..

For example, during the period incumbent LECs were regulated under price cap regimes, they have managed to make significant investments in excess digital switching in order to undermine the competitive inroads of PBX entry into the vertical services market.

> "Thus, on average, in excess of four loops (plus even more for spare) will have been constructed and deployed for every *one* Centrex line that is actually placed in service." [5]

> "Unlike PBX systems that require a relatively small complement of loop pairs (PBX trunks) to serve a much larger number of individual PBX station lines...Centrex service requires one loop pair for each station line..."[6]

During the period of price cap regulation incumbent LECs may have also made anticompetitive investments in preparation for their entry into video and long distance markets. Prior to the passage of the Telecommunications Act of 1996, the Commission

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[5] Analysis of Incumbent LEC Embedded Investment, Lee Selwyn and Patricia Kravtin, Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (Selwyn Affidavit), CC Docket No. 96-98. AT&T Comments, Appendix A, at 28.

[6] Id., at 29.

recognized that while ILECs' Section 214 applications were not clearly unlawful, their applications raised many concerns regarding their allocation of costs and subsequent tariffs. For example, in the case of Bell Atlantic's video dialtone rates in Dover Township, the Commission concluded that Bell Atlantic's tariff raised sufficient questions of lawfulness with respect to its cost allocation methods, rate levels, and various terms and conditions, that it warranted suspension and investigation.[7]

2. Investments may be anticompetitive and not necessarily inefficient

The Commission has also viewed Section 214 review as an opportunity to address potentially anticompetitive aspects of incumbent LEC investment decisions.

> "Occasionally, review under Section 214 serves as a tool for us to reflect our concerns about the impacts of AT&T's entry, expansion, and exit in and from facilities and services on various regulatory policies. As an illustration, we rejected AT&T's tariff to offer a basic packet data switching service (BPSS) after complainants asserted that, contrary to Second Computer Inquiry, the service would favor AT&T's subsidiary."[8]

Incumbent firms may make investments that are designed to thwart the efficient operations of their competitors, or favor their affiliates, independent of whether the investments are inefficient for their own networks. Preventing this sort of discriminatory investment will be an important part of the Commission's role in shepherding the development of local competition. Because Section 214 review occurs prior to service provision, in contrast to the Commission's affiliate transaction and cost allocation

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[7] In the Matter of Bell Atlantic Telephone Companies Revisions to Tariff FCC No. 10, Rates, Terms, and Regulations for Video Dialtone service in Dover Township, New Jersey, Transmittal Nos. 741, 786, CC Docket No. 95-145.

[8] Selwyn Affidavit at para 21.

regulations, it remains the most appropriate method of limiting the impact of discriminatory investments. The Commission needs to retain its Section 214 authority for this purpose.

3. Section 214 review complements other regulatory tools

The Commission has historically recognized that its cost allocation, prudence review, and other regulatory tools complement, rather than substitute for, or supercede, Section 214 review.

> "Scrutiny under section 214 can be a more economical means of preventing improvident or unduly expensive investments and the resulting increases in rates than the alternative of subsequent disallowance of an expenditure from the rate base."[9]

The Commission has recognized that a variety of regulatory tools are needed to transform markets dominated by single carriers, to markets populated by effective competitors.

4. Circumstances have altered the need for Section 214 review only with regard to duplicative investments

The previous discussion clearly shows that changes in regulatory regimes and the onset of competition allow the Commission to drop its concern about duplicative investments. But, there remain numerous anticompetitive investment opportunities an incumbent may take even if it does not inflate rates. The Commission should continue to address these concerns through Section 214 review, in conjunction with other regulatory tools at its disposal.

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[9] Ibid.

B. Congress Altered its Intent Regarding Section 214 in the 1996 Act Only with Respect to Line Extensions

The Commission correctly notes that a stated legislative purpose of the 1996 Act is "...to promote competition and reduce regulation in order to secure lower prices and higher quality services...and encourage the rapid deployment of new telecommunications technologies."[10] However, Congress limited its revisions to Section 214. Section 402(b)(2)(A) of the 1996 Act permits the Commission to exempt carriers from the requirements of Section 214 for the extension of any line, but does not directly authorize the Commission to exempt carriers from other Section 214 requirements. Nowhere does Congress state or imply that the remaining aspects of Section 214 are in conflict with the promotion of competition. In fact, Commission interpretations of Congress' intent discussed above, that have never been disavowed by the Commission, show that Section 214 review of new lines could promote the competitive process by helping to limit inefficient and anticompetitive incumbent LEC investments.

In no other way did Congress alter its intent with regard to Section 214 as a result of the 1996 Act. Consequently, the Commission may not rely on Congressional intent to explain why it now directly contradicts years of its own practice by concluding

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[10] Notice at para. 9.

that "[t]he Section 214 certification process is not designed to prevent such abusive practices and, furthermore, the Commission has in place rules specifically addressing anticompetitive and discriminatory practices."[11]

II. The Commission Correctly Defines Line Extension and New Lines

In this Notice, the Commission tentatively concluded "...that an 'extension of a line' is a line that allows the carrier to expand its service into geographic territory that it is eligible to serve, but that its network does not currently reach."[12] The Commission also tentatively concluded that new lines include "...an increase in the capabilities of a carrier's existing network..."[13]

MCI agrees with these tentative conclusions and believes they are consistent with Congressional intent with regard to Section 214. The threat dominant carriers pose to the development of competition is greatest with respect to those areas they already serve, for in these areas they are able to prevent entry by disguising anticompetitive investments in excess capacity as investments required for normal

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[11] As discussed immediately above, the Commission has historically viewed Section 214 as complementary to its cost allocation rules. Moreover, the Commission has recently recognized the need that its existing cost allocation rules do not adequately protect customers from inefficient investments in excess capacity. See, Notice of Proposed Rulemaking, Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, CC Docket 96-112 at para. 40.

[12] Notice at para 21.

[13] Ibid.

business operations. For this reason, MCI opposes alternate definitions that would include augmentation or capacity increases of lines in a carrier's network to be a line extension, rather than a new line.[14]

III. Forbearance Should be Limited to Non-Dominant Carriers

In its Notice, the Commission applied its newly created forbearance authority to its Section 214 rules, and tentatively concluded that price cap LECs, average schedule LECs, and non-dominant LECs "...should no longer be required to obtain Section 214 authorization for the construction, acquisition, or operation of new lines between domestic points, or for transmission over such lines,"[15] because existing rate regulation mechanisms prevent these carriers from raising rates and engaging in unreasonable discrimination.

In its Notice, the Commission identifies the conditions it must meet in order to exercise its forbearance authority.

> "Section 401 amends Title I of the Communications Act of 1934 by adding a new Section 10.[16] Section 10(a) directs the Commission to forbear from enforcing a regulation or provision of the Communications Act when: (1) enforcement is not necessary to ensure that the charges, **practices**, classifications, or regulations by, for, or in connection with a carrier or service are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. Section 10(b) further instructs the Commission to consider whether forbearance will promote competitive market conditions and **enhance competition** among providers of telecommunications services. If the Commission determines

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[14] Notice at para. 35(ii-iii).

[15] Notice at para. 37.

[16] 47 U.S.C. § 160.

> that such forbearance will promote competition among providers of telecommunications services, that determination may provide the basis for the Commission's finding, pursuant to subsection 10(a)(3), that forbearance is in the public interest."[17] (emphases added)

A. The Commission Does Not Provide Sufficient Evidence to Support Forbearing from Enforcing Section 214 for Price Cap Carriers

The Commission tentatively concludes that it may forbear from applying its Section 214 rules to price cap carriers, whether or not they have adopted the sharing option. The Commission recognizes that a price cap carrier that elects a sharing option if its interstate earnings fell below a specified floor may be able to raise rates by exercising the low-end adjustment mechanism, but makes three arguments supporting its belief that competitive harm will be minimal if it forbears.[18]

First, the Commission argues that possible rate increases due to strategic over-investment are small since the low-end adjustment mechanism would only apply to the revenue loss associated with the 100% sharing zone. Second, the Commission implies that since price cap LECs have recently adopted the no-sharing option "the "benefits associated with the no-sharing option exceed the benefits of adopting a sharing option and strategically overinvesting in facilities."[19] Third, the Commission believes that the growth in local exchange and interstate access competition will limit anticompetitive price increases.[20]

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[17] Notice at para. 39.

[18] Notice at para. 41.

[19] Ibid.

[20] Ibid.

These arguments do not meet the burden of proof as required by two aspects of Section 401 of the 1996 Act. First, the Commission must provide evidence that enforcing its Section 214 requirements is not necessary to ensure not only that charges are reasonable and nondiscriminatory, but also, that "**practices and classifications...** in connection with a carrier or service are just and reasonable and not unjustly or unreasonably discriminatory."[21] Second, the Commission must provide evidence that "...forbearance will promote competitive market conditions and **enhance competition**."[22] (emphases added)

The Commission has failed to even show that these conditions are currently met. Even a minimal anticompetitive effect diminishes, rather than enhances and promotes, competition as the 1996 Act requires. Due to the prior overinvestment in strategic facilities, as well as other inefficient investment, existing LEC interstate access rates are inflated far above economic cost. As MCI shows in its Comments in the Commission's Access Reform Proceeding, until these rates are brought down to economic cost, both interstate and local competition will be retarded.[23] Far from showing that forbearance will promote competition as the 1996 Act requires, even minimally unjustified rate levels only promote incumbents and retard the competitive process.

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[21] Section 401, 1996 Act.

[22] Ibid.

[23] In the Matter of Access Charge Reform, CC, Docket No. 96-262, MCI Comments at ii.

Assuming for the sake of argument, that conditions currently justified forbearing from enforcing its Section 214 authority, the Commission has failed to provide evidence that these conditions will continue to be met. First, although price cap LECs have recently adopted the no-sharing option, existing rules do not foreclose the possibility that price cap LECs will exercise the no-sharing option in the future. The possibility this will occur will be enhanced once the Commission reduces the risk of strategic overinvestment by forebearing from its Section 214 authority. Stated differently, the "facts" the Commission refers to are based on incentives premised, in part, on the continued enforcement of its Section 214 rules.

Second, and most important, the Commission must show that forbearing in this instance will not result in the practices and classifications of price cap LECs becoming unjust or unreasonably discriminatory. Price increases are not the only threat to the development of competition. As the Commission noted in Competitive Common Carrier Services Order, incumbent carriers may take anticompetitive investment actions that involve non-price discrimination. The Commission has never argued that price cap regulation has diminished the incentives to engage in price discrimination or forms of non-price discrimination.

For the above-stated reasons, the Commission has not met its evidentiary requirement for forbearing from enforcing its Section 214 rules for any price cap LEC, whether or not such a LEC chooses the sharing option.

B. The Commission Does Not Provide Sufficient Evidence in Support of Forbearing from Enforcing Section 214 for Average Schedule LECs

The Commission concludes it may forbear from enforcing its Section 214 authority for average schedule LECs because they are not able to increase their rates above existing average rates.[24] This is only true for the period between annual filings. Rates for these LECs can be modified every year through NECA's annual modification of annual schedules. One cannot reasonably conclude that having to wait one year for a rate increase constrains the ability of average schedule LECs to overinvest in facilities. As was the case with price cap carriers, anticompetitive actions of average schedule carriers may take the form of price and non-price discrimination in addition to raising rates. Here too, the Commission fails to address this possibility.

C. The Commission Correctly Concludes it May Forbear from Enforcing its Section 214 Rules on Non-dominant Carriers

The Commission also proposes forbearing from enforcing its Section 214 requirements on non-dominant carriers since the market will "limit the ability of non-dominant carriers to recover the cost of unnecessary facilities from telephone service ratepayers."[25] MCI supports this proposal. The customers of non-dominant carriers, face alternative providers that ubiquitously serve the market. Consequently, non-dominant carriers are not only unable to recover the cost of unnecessary facilities, they would also immediately be penalized in the event they attempted price or non-price discrimination discussed above.

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[24] Notice at para. 42.

[25] Id., at para. 43.

D. The Commission Should Exercise its Forbearance Authority More Cautiously Since Future Decisions May Retard Competition

The Commission also seeks comment on whether decisions it may make in other proceedings, or may be made by other legal bodies will affect the potential for duplicative and wasteful investments. These factors might include: a) having to adopt positions closer to those advocated by the LECs in the event the Commission's Interconnection Order is remanded by the 8th Circuit Court; and b) policies adopted by the Commission in its Access Reform Proceeding.

The Commission should exercise its forbearance authority more cautiously than it has proposed in this proceeding, since future decisions may retard, rather than promote, competition. If the 8th Circuit remands the Commission's Interconnection Order in a fashion that limits it from requiring LECs to offer unbundled network elements at forward looking incremental cost, or alters the Commission's avoided cost methodology for wholesale pricing, the economic viability of new entrants that rely on unbundled network element and resale strategy will be jeopardized. Not only will this greatly retard the development of local competition, it will also undermine the "market-based" approach to reducing interstate access charges to their economic cost.

E. The Commission Should Apply its Streamlined Application Procedures to All Dominant Carriers, Not Only Those under Rate of Return Regulation

In its Notice, the Commission proposes streamlining its "...Section 63.01 filing requirements by eliminating the filing of unnecessary information and providing for automatic approval of Section 214 applications thirty-one days after the Commission issues public notice that the application has been accepted for filing.[26] Specifically, the Commission proposes to eliminate the following information

> "(a) whether the carrier is or will become a carrier subject to Section 214 of the Communications Act; (b) whether the facilities will be used to extend communication services into territory at present not directly served by the applicant or to supplement existing facilities of the applicant; (c) the types of services to be provided over the proposed facilities; (d) the applicant's present and estimated future facilities requirements; (e) the map or sketch showing the proposed facilities; (f) a description of the manner and means by which other interstate and foreign communications services of a similar character are now being rendered by the applicant and others in the area to be served by the proposed facilities; (g) proposed tariff charges and regulations for domestic applications; (h) a statement of the accounting proposed to be performed in connection with the project; and (I) whether the carrier has an affiliation with a foreign carrier."[27]

MCI supports the Commission's desire to reduce the regulatory costs associated with Section 214 applications. MCI believes that significant reductions in regulatory costs can be achieved by applying more streamlined filing procedures to all dominant carriers, not only dominant rate-of-return carriers. This reduction in regulatory cost and delay will permit all dominant carriers to proceed more quickly with legitimate expansion plans that will promote competition, without abandoning the safeguards inhering in the Commission's Section 214 rules that limit anticompetitive investments and offerings.

As discussed in Section I. A. *supra*, dominant carriers may undertake investments that foreclose entry by investing in excess capacity; that discriminate in

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[26] Id., at para. 53.

[27] Id., at para. 55.

favor of an affiliate or subsidiary; that are designed in such a way as to lower the quality of service obtained by interconnecting carriers relative to their own; or that are made with the intent of offering services under discriminatory terms and conditions.

The Commission should require dominant carriers' Section 214 applications to contain information sufficiently detailed to permit the Commission to determine that these forms of discrimination will not occur. Therefore, MCI recommends the Commission retain the following items in addition to those listed in paragraph 54 of its Notice: (c) the types of services to be provided over the proposed facilities; (g) proposed tariff charges and regulations for domestic applications; (h) a statement of the accounting proposed to be performed in connection with the project.

IV. Discontinuance

In its Notice, the Commission seeks comment on whether it should extend streamlined discontinuance procedures found in Section 63.71 of its rules to all domestic carriers. The Commission tentatively concludes in favor of this extension, arguing that even dominant carriers assume a certain amount of risk when entering a new geographic or product market."[28]

MCI opposes extending streamlined discontinuance procedures to dominant carriers. As the Commission notes, "[t]he 1996 Act does not alter the Commission's authority under Section 214(a) with respect to discontinuances or reductions in services."[29] The fact that LECs that are incumbent LECs within their initial service

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[28] Id., at para. 70.

[29] Ibid.

territory may bear risks upon entering a new territory, does not justify relaxing discontinuance procedures in service territories where it remains dominant.

V. Conclusion

For the above-mentioned reasons, MCI encourages the Commission to adopt the tentative conclusions that it proposes in the Notice, and to adopt the proposals suggested by MCI herein.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION

Lawrence Fenster

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February 24, 1997

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on February 24, 1997.

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CERTIFICATE OF SERVICE

I, Lonzena Rogers, do hereby certify that a copy of the foregoing **Comments** has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 24th February, 1997.

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